UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI SOUTHEASTERN DIVISION

DEREK W. CORNELIUS and)	
SI03, INC.)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:09-CV-72-SNLJ
)	
RYAN DELUCA, et al.,)	
)	
Defendants.)	

<u>DEFENDANT GASPARI NUTRITION, INC.'S MOTION TO DISMISS PLAINTIFFS'</u> <u>SECOND AMENDED COMPLAINT</u>

Pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(5), and 12(b)(6), Defendant, Gaspari Nutrition, Inc. ("Gaspari"), files the following Motion to Dismiss Plaintiffs' Second Amended Complaint as against Gaspari, and in support states as follows:

- 1. On October 20, 2008, Plaintiffs Derek W. Cornelius and Syntrax Innovations, Inc. (collectively, "Plaintiffs") filed their Petition for Damages in the St. Louis City Circuit Court against a number of defendants, including Gaspari. Plaintiffs amended their petition ("Petition") on or about October 31, 2008. Defendants Ryan DeLuca d/b/a Bodybuilding.com, Bryna Matthews d/b/a Bodybuilding.com, and Bodybuilding.com, LLC (collectively, the "Bodybuilding Defendants"), removed the case to this Court on December 2, 2008. (Doc. # 1). Plaintiffs moved to amend their petition for the second time on August 18, 2009 ("Complaint"). (Doc. # 41, Exh. 1). Plaintiffs' motion was granted on August 19, 2009.
- 2. Plaintiffs allege that, among others, a representative of Gaspari, a purportedly direct competitor of Plaintiffs, posted on the forum board of an internet website,

SI03, Inc. was substituted for Syntrax Innovations, Inc. as the real party in interest, per order of the Court on August 19, 2009.

www.bodybuilding.com (the "Website"), libelous statements about Plaintiffs and nutraceutical products manufactured by Plaintiffs. (Doc. # 41, Exh. 1, ¶¶ 80-87).

- 3. Based solely on three purported postings by a representative of Gaspari, Plaintiffs bring the following six causes of action against Gaspari: (i) violation of the Lanham Act, 15 U.S.C. § 1125(a); (ii) tortious interference with business expectancy or prospective business relationships; (iii) injurious falsehood; (iv) defamation; (v) libel; and (vi) civil conspiracy.
- 4. Gaspari is filing herewith a Memorandum of Law in Support of its Motion to Dismiss Plaintiffs' Second Amended Complaint. The Memorandum of Law is incorporated by reference as if set forth fully herein. For the following reasons and as more fully set forth in Gaspari's Memorandum of Law, Plaintiffs' Complaint contains the following deficiencies such that it should be dismissed as against Gaspari:
- a. This Court does not have personal jurisdiction over Gaspari. Therefore, Plaintiffs' Complaint as against Gaspari should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2).
- b. Plaintiffs failed to deliver a copy of the summons and Petition to an officer, a managing or general agent, person having charge of any office, registered agent, or any other agent authorized by appointment or by law to receive service of process on behalf of Gaspari as required under Federal rules and Missouri statutes. Therefore, because Plaintiffs have failed to properly effectuate service on Gaspari, Plaintiffs' Complaint as against Gaspari should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(5).
- c. Count VI of Plaintiffs' Complaint fails to state a cause of action for civil conspiracy because Plaintiffs have not alleged that there was a "meeting of the minds" among

3182197.1

the defendants or any facts to support a finding that there had been a "meeting of the minds." Therefore, Count VI of Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b)(6).

WHEREFORE, for the reasons stated in this Motion and in Gaspari's Memorandum of Law in Support thereof, defendant Gaspari Nutrition, Inc. respectfully requests that this Court dismiss Plaintiffs' Second Amended Complaint as against Gaspari with prejudice.

Respectfully Submitted,

BRYAN CAVE LLP

By: /s/ Kevin M. Abel Kevin M. Abel, #2500 Sayler A. Ault Fleming, # 5219678 211 North Broadway, Suite 3600 St. Louis, MO 63102 (314) 259-2000 (telephone) (314) 259-2020 (facsimile) kmabel@bryancave.com sayler.fleming@bryancave.com

Attorneys for Defendant Gaspari Nutrition, Inc.

3182197.1

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2009, the foregoing was filed electronically with the Clerk of Court to be served upon the following by operation of the Court's electronic filing system and by first-class U.S. mail:

Matthew A. Rosenberg, Esq. LAW OFFICES OF MATTHEW ROSENBERG, LLC 36 Four Seasons Ctr., #116 St. Louis, MO 63017

Attorney for Plaintiffs Derek W. Cornelius and Syntrax Innovations, Inc.

Gary A. Pierson, II, Esq. R. Prescott Stifton HUSCH BLACKWELL SANDERS, LLP 720 Olive Street, 24th Floor St. Louis, MO 63101

M. Kelly Tillery PEPPER AND HAMILTON 18th and Arch Street 3000 Two Logan Square Philadelphia, PA 19120

Attorneys for Defendants Ryan Deluca, Bryna Matthews Deluca, and Bodybuilding.com, L.L.C.

Dale M. Weppner, Esq.
Mary L. Taylor, Esq.
GREENSFELDER AND HEMKER, PC
2000 Equitable Building
10 South Broadway
St. Louis, MO 63102

Leslie Miller Greenspan, Esq. Kim R. Jessum, Esq. STRADLEY AND RONON, LLP 2600 One Commerce Square Philadelphia, PA 19103-7098

Attorneys for Defendant Molecular Nutrition, L.L.C.

3182197.1 4

Jeffrey J. Pardo PARDO & GAINSBURG, LLP 2 South Biscayne Boulevard Suite 2475 Miami, FL 33131

Attorneys for Defendant Bodywell Nutrition, Inc.

Lawrence C. Moore, III ROBINSON, BRADSHAW & HINSON, P.A. 101 North Tryon Street, Suite 1900 Charlotte, NC 28246

Attorneys for Defendant ISS Research

Edmond E. Salem LAW OFFICES OF EDMOND E. SALEM 2001 Wilshire Boulevard, Suite 305 Santa Monica, CA 90403-5683

Attorneys for Defendant Scientifically Advanced Nutrition

/s/ Kevin M. Abel

3182197.1 5